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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

17 CR 686 (LAK)

5 JAMES GATTO, ET AL.,

6 Defendants.

7 -----x

8 New York, N.Y.

9 March 22, 2018

4:16 p.m.

10 Before:

11 HON. LEWIS A. KAPLAN

12 District Judge

13 APPEARANCES

14 GEOFFREY S. BERMAN

15 Interim United States Attorney for the

16 Southern District of New York

17 EDWARD B. DISKANT

ELI J. MARK

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21 MICHAEL S. SCHACHTER

CASEY E. DONNELLY

22 STROOK STROOK & LEVAN

23 Attorney for Defendant Merl Code

JAMES L. BERNARD

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1 (Case called)

2 MR. DISKANT: Good afternoon, your Honor. Edward  
3 Diskant, Eli Mark, Aline Flodr, Noah Solowiejczyk and Robert  
4 Boone for government.

5 THE COURT: Good afternoon.

6 THE CLERK: Defendant Gatto, are you ready?

7 MR. SCHACHTER: Good afternoon, your Honor.

8 Michael Schachter and Casey Donnelly on behalf of  
9 Mr. Gatto.

10 THE COURT: Mr. Schachter.

11 THE CLERK: Defendant Code, are you ready?

12 MR. BERNARD: Good afternoon, your Honor. James  
13 Bernard for Mr. Code.

14 THE CLERK: Defendant Dawkins, are you ready?

15 MS. DONNELLY: I'll be arguing for Mr. Dawkins today.

16 THE COURT: And you are?

17 MS. DONNELLY: Ms. Donnelly.

18 THE COURT: Ms.?

19 MS. DONNELLY: Casey Donnelly.

20 THE COURT: Say it slowly and loudly.

21 MS. DONNELLY: Casey Donnelly.

22 THE COURT: I see, Ms. Donnelly. OK.

23 Thank you.

24 MS. DONNELLY: Sure.

25 THE COURT: All right. We'll start with the motion to

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1 suppress evidence from the search of the cellphones. Who is  
2 up.

3 MR. SCHACHTER: I think that's me, your Honor.

4 Your Honor, does the Court have a preference for me to  
5 argue from here or from the lecturn?

6 THE COURT: Lecturn.

7 MR. SCHACHTER: Thank you, your Honor.

8 THE COURT: Has to do with audibility.

9 MR. SCHACHTER: Your Honor, we seek to suppress any  
10 evidence found from the searches of the cellphones of the three  
11 defendants for several reasons. The first is that there was  
12 lacking probable cause in the search warrant affidavit in order  
13 to search the data found on the cellphone.

14 With respect to Mr. Gatto, the only evidence that was  
15 set forth in the search warrant affidavit, in the application,  
16 with respect to Mr. Gatto was that he made eight telephone  
17 calls. And, of course, the evidence of those calls does not  
18 reside on the cellphone. And so the question is for what  
19 reason would the existence of eight phonecalls give the  
20 government probable cause to search for evidence on the  
21 mountains of data which exists on a cellphone which, as we all  
22 know, is somebody's internet search history, their photos,  
23 their communications, their notes, bank records. People  
24 contain their entire lives or people hold their entire lives on  
25 their cellphone. We submit that there is no more probable

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1 cause to search the data on somebody's cellphone based solely  
2 on the existence of telephone calls than there would be  
3 probable cause to search their office or their home.

4 THE COURT: Do you think it's a little more likely  
5 that people who make and receive voice communications over  
6 cellphones are more probable than the average bear to exchange  
7 text messages?

8 MR. SCHACHTER: I don't think there's any case that  
9 says that.

10 THE COURT: That's not what I asked you.

11 MR. SCHACHTER: No. I don't think that there is any  
12 greater -- I think we are all --

13 THE COURT: So you think somebody with a landline is  
14 just as likely to exchange text messages as somebody who uses a  
15 cellphone routinely for voice?

16 MR. SCHACHTER: I guess the way I would answer that is  
17 to say I think everybody is likely to engage in text messages.  
18 Members of the government team, I am, everybody in the gallery,  
19 sends text messages. The question is really --

20 THE COURT: Now we're getting somewhere.

21 MR. SCHACHTER: The question really is: Is there  
22 probable cause to believe that evidence of criminal activity  
23 will be found in those text messages simply because they  
24 engaged in telephone conversations. And I think there is no  
25 greater --

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1 THE COURT: That's such an oversimplification of this,  
2 isn't it?

3 The probable cause analysis is not they made  
4 phonecalls, therefore, there's probable cause to think there's  
5 evidence of crime in the text messages. It is that they made  
6 telephone calls with particular types of content, right?

7 MR. SCHACHTER: Yes. The allegation is that they  
8 engaged in criminal activity and that that criminal activity  
9 was discussed by phone.

10 And I think it's clear that the fact that somebody  
11 engages in a telephone call regarding criminal activity does  
12 not open up their residence, their home, their -- their  
13 residence, their office, their personal files to a search by  
14 the government.

15 THE COURT: Really? How about this phonecall:  
16 Charlie, I've got the records of the fraud that we're  
17 perpetrating on Wells Fargo bank in my garage.

18 How about that? Do you think that opens up a search?

19 MR. SCHACHTER: Of course, yes.

20 THE COURT: The vast broad statements, my bottomline  
21 here, are not advancing your case.

22 MR. SCHACHTER: Understood, your Honor.

23 I guess my point is that there are no telephone calls  
24 involving Mr. Gatto in which they are referring to  
25 communications by text message. If there were, we wouldn't be

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1 making this argument.

2 The search warrant application with respect to  
3 Mr. Gatto does not speak of where there may be other evidence  
4 found. They don't speak of text messages. They don't speak of  
5 e-mails. They don't speak of any of the data which could be  
6 found on their home and, therefore, the fact that they engaged  
7 in these calls, we submit, does not create probable cause to  
8 believe that there would be evidence in the data on his phone  
9 anymore than there would be probable cause to believe that  
10 there would be evidence in his home or in his office.

11 Our submission is that the government needs to do more  
12 before they are going to search the data on somebody's phone.  
13 They need to create some kind of probable cause to believe,  
14 based on the evidence that they have, based on evidence that  
15 there will be found, that there is likely to be found evidence  
16 in a particular place.

17 THE COURT: What appellate case says that?

18 MR. SCHACHTER: Well, the Supreme Court said that in  
19 Illinois v. Gates.

20 THE COURT: In what year? 1962, perhaps?

21 MR. SCHACHTER: I imagine that you're correct, your  
22 Honor.

23 THE COURT: Well it's just a law school memory.

24 MR. SCHACHTER: 1983.

25 THE COURT: 1983. Were cellphones very common then?

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1 MR. SCHACHTER: No. Since that time the Supreme Court  
2 has spoken on multiple occasions about really the significant  
3 privacy interests that are at issue in people's phones.

4 THE COURT: No doubt about that.

5 MR. SCHACHTER: This is an issue that is a relatively  
6 new issue that the law needs to confront because of the  
7 enormity of personal data which exists on cellphones.

8 And so since 1983 I think that there is a greater  
9 recognition, and the Supreme Court has spoken about that, there  
10 is a greater recognition that we need to safeguard people's  
11 privacy with respect to the data on their phones the same way  
12 that we safeguard people's homes. And certainly the  
13 government, when they're able to show probable cause to believe  
14 that there is going to be evidence of criminal activity in  
15 somebody's home, the government may intrude on somebody's home.  
16 They may search the residence.

17 THE COURT: Does a warrant have to say there's  
18 probable cause to believe it will be under the center cushion  
19 on the couch?

20 MR. SCHACHTER: It does not.

21 However, it does need to establish probable cause not  
22 just that the person engaged in criminal activity but that  
23 there will be evidence of that criminality in that particular  
24 location.

25 THE COURT: And here there is probable cause to

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1 believe they engaged in criminality on the telephone.

2 MR. SCHACHTER: We obviously dispute whether or not  
3 it's evidence of criminality but certainly accepting the  
4 government's theory, then the government has laid out probable  
5 cause to believe that there was evidence of criminality that  
6 was discussed using that phone, that we submit, your Honor, is  
7 very distinct from concluding that there is probable cause to  
8 believe that there is evidence of criminality to be found in  
9 the enormous amount of data which is found on that phone. And  
10 that is really the distinction.

11 The government did not seek a search warrant to search  
12 Mr. Gatto's home based on the fact that he had made these  
13 calls.

14 THE COURT: Let me come back to the question that  
15 elicited Illinois v. Gates from you which obviously has no  
16 application to cellphones specifically in the sense that you're  
17 speaking of.

18 Do you have a single appellate case that says that if  
19 they have probable cause to believe the phone has been used to  
20 discuss criminal activity they need to discuss probable cause  
21 to look in each particular type of file on the phone as opposed  
22 to getting a warrant for phone?

23 MR. SCHACHTER: This issue has been discussed by  
24 multiple district courts, but I'm unaware of an appellate  
25 decision that discusses that squarely.



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1 THE COURT: So now let's cut to the chase. We have  
2 here in the case of Mr. Gatto a warrant application that is, I  
3 don't know, several dozen pages, right?

4 MR. SCHACHTER: Yes, your Honor.

5 THE COURT: And if a United States magistrate judge  
6 found that an application to establish probable cause for the  
7 search that was authorized, why aren't the agents entitled to  
8 rely on that in good faith even if you are right?

9 MR. SCHACHTER: Because one of the exceptions to the  
10 good faith exception is where the search warrant application is  
11 so lacking in indicia of probable cause that it would be  
12 unreasonable to conclude that the search warrant application  
13 provides probable cause to search the data on Mr. Gatto's  
14 cellphone. That is our position.

15 THE COURT: So your position is that an agent, faced  
16 with about a 40-page application, and a magistrate judge's  
17 decision to issue the warrant authorizing the search of the  
18 phone, and it is, first of all, chargeable with knowledge with  
19 whatever the body of law is; secondly aware, therefore, that  
20 there is no appellate case that supports your point of view,  
21 your position is it is nonetheless unreasonable as a matter of  
22 law for that agent to conclude that maybe the magistrate judge  
23 got it right?

24 MR. SCHACHTER: I suppose I would analyze that  
25 question from just the opposite direction which is there are no

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1 cases that say that the existence of telephone calls provides  
2 probable cause to conclude that there is evidence of  
3 criminality in the data that is stored on the cellphone. And  
4 absent such case law, that is what should cause an agent to  
5 conclude that it would not be a good faith search based on that  
6 search warrant application.

7 There simply is no case law that says that simply the  
8 fact that you have telephone calls involving criminal activity  
9 creates probable cause to search somebody's home, somebody's  
10 office, or the data on their cellphone. And we think that's no  
11 different.

12 THE COURT: Would you estimate for me how many times  
13 in the last ten days you have attempted to reach somebody by  
14 telephone, failed, and sent a text or an e-mail instead.

15 MR. SCHACHTER: That is extremely commonplace. I  
16 would certainly concede that.

17 I only submit that that does not meet the legal  
18 threshold of establishing there's probable cause, that there's  
19 fair probability that evidence of a crime will be found in a  
20 particular place, here, the data on the phone.

21 THE COURT: OK. I have your argument.

22 Do you want to go on to the Miranda?

23 MR. SCHACHTER: The other argument is that the search  
24 warrant was overbroad which I can address but it's in our  
25 papers, your Honor.

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1 THE COURT: Whatever you want.

2 MR. SCHACHTER: We also submit that the search warrant  
3 was overbroad in that it -- rather than confining the search to  
4 particular types of data on the phone, it permitted the  
5 government to search the entirety of the phone. And we think  
6 that in that regard it is an overbroad general warrant which  
7 allows for the government to rummage through so much personal  
8 data when that is unnecessary. The search warrant could have  
9 been tailored to particular places, certain types of data,  
10 rather, on the phone. And that is how the search warrant  
11 should be crafted.

12 THE COURT: Give me an example.

13 MR. SCHACHTER: The search warrant protocol allows the  
14 government to search the entirety of the phone. There is  
15 nothing on the phone that the government is not permitted to  
16 search. If they wished to search Mr. Gatto's internet search  
17 history, they would be permitted to. If they wished to search  
18 Mr. Gatto's photographs, they would be permitted to.

19 There is no limitation, no direction to the government  
20 that they may only search, for example, text messages.

21 THE COURT: Isn't it possible and isn't it frequently  
22 done that word processing documents, text messages, e-mails,  
23 are converted into various types of graphic files and vice  
24 versa?

25 MR. SCHACHTER: I certainly would agree that that

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1 happens.

2 THE COURT: And, therefore, if a phone is being used  
3 to text, to e-mail, isn't it just a reasonable possibility,  
4 maybe even a probability, but certainly a reasonable  
5 possibility that what we would commonly refer to as image files  
6 are, in fact, images of documents?

7 MR. SCHACHTER: I certainly would agree with your  
8 Honor that the government could speculate. They could even  
9 think that maybe there is evidence in lots of places on the  
10 phone.

11 I suggest that the law is as Judge Nathan described it  
12 in United States v. Wey. When she was analyzing searchable  
13 electronic data she said that the government must first explain  
14 how and why each type of data they wished to search is  
15 connected to criminal activity. And I submit that when you are  
16 talking about the search of the electronic data on somebody's  
17 cellphone or on their computer, that the government must layout  
18 in its application either why they believe that evidence of  
19 criminality will be found, that there's probable cause that it  
20 will be found throughout the entirety of the data and that's  
21 why they need to search it, or they need to confine the search  
22 warrant that's requested to only those -- a search of  
23 categories of data where there is probable cause to believe  
24 that evidence of a crime will be found in that particular  
25 place.

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1 Your Honor, we submit that there --

2 THE COURT: Let me ask you a question. If the  
3 sentence at the end of the warrant, right near the end, that  
4 reads, "Depending on the circumstances, a complete review of  
5 the seized ESI may require examination of all of the seized  
6 data to evaluate its contents and determine whether the data is  
7 responsive to the warrant" had been omitted or deleted you  
8 wouldn't have the general warrant argument, right?

9 MR. SCHACHTER: Your Honor, we would submit that we  
10 would still have a problem, and the reason for that is that it  
11 does not --

12 THE COURT: You can tell me about your problem in a  
13 minute.

14 MR. SCHACHTER: That will take a long time.

15 THE COURT: Answer my question first. It's that  
16 sentence that your general warrant argument hangs on, isn't it?

17 MR. SCHACHTER: It is. Although without that  
18 sentence, the government is still being permitted to search the  
19 cellphone. There is no limitation. If you take out that  
20 sentence, you still don't have a limitation. That sentence  
21 makes clear that the warrant is without limitation.

22 THE COURT: I'm not sure you're right. But maybe you  
23 are. Let's work through it.

24 They complain they're looking for fruits of a  
25 particular kind of crime. They cite the statutes. They list

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1 paragraphs (a) through (f) describing what kind of  
2 communications and other data. And then in the paragraph from  
3 which I read the sentence they have what I guess in these days  
4 is called the protocol about how they're going to go through  
5 the data on the phone. And it includes things like opening or  
6 reading the first few pages of files to see whether they're  
7 responsive.

8 Now, what's wrong with that?

9 MR. SCHACHTER: Well, what's wrong with that is, your  
10 Honor, we submit that it permits a general rummaging by the  
11 government in a lot of places on that phone where they do not  
12 have probable cause to believe that they will find evidence of  
13 criminality.

14 And not to suggest that there isn't a theoretical  
15 possibility, but that's not the test.

16 Surely, the government can articulate why they suspect  
17 that maybe anywhere on that phone may be evidence of  
18 criminality. But that's not the test. The test is that they  
19 have to have a fair probability that evidence of a criminal  
20 activity will be found in a particular place. And that we  
21 suggest, your Honor, renders the search warrant overbroad and  
22 violative of the Fourth Amendment.

23 THE COURT: OK. I think I have your argument. Do you  
24 want to say anything about the password?

25 MR. SCHACHTER: Yes, your Honor. Although I note

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1 that --

2 MR. BERNARD: Your Honor, if --

3 THE COURT: I'm sorry. I can't hear you. You're  
4 talking over each other.

5 MR. BERNARD: I'm sorry, your Honor. If I may just  
6 address the issue that you just raised with respect to  
7 defendant Code.

8 THE COURT: Briefly.

9 MR. BERNARD: Your Honor, I would just point out that  
10 the search warrant affidavit for Mr. Code actually is quite  
11 specific with respect to what type of data the government is  
12 allowed to review. It goes directly to the point that counsel  
13 was just making. It's Exhibit 2 to the motion and there's two  
14 relevant paragraphs, your Honor.

15 Paragraph 6 says, "Based on my training, experience,  
16 and participation in this investigation I know that the subject  
17 devices can be used to make and receive telephone calls and  
18 send and receive text messages and e-mails." That's the limit  
19 with respect to what type of data could be reviewed.

20 THE COURT: You're reading from what, the affidavit?

21 MR. BERNARD: The affidavit, yes, your Honor.

22 THE COURT: OK. Go ahead.

23 MR. BERNARD: Paragraph 21 then elaborates on that.  
24 It says, "Moreover and based on my training and experience, I  
25 am aware that cellphones like the subject devices that had been

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1 used to communicate with others about fraud schemes often  
2 contains records of that activity," and then here are the other  
3 types of data "including call logs, voice mail messages, text  
4 messages, e-mail correspondence, contact information, and other  
5 identifying data regarding coconspirators, notes about calls,  
6 and meetings relevant to the subject offenses, and the like,"  
7 whatever and "the like" means.

8 I submit, Judge, that the point that was being made  
9 regarding photographs, for example, to be specific, and  
10 internet search histories, are noticeably absent from the  
11 description in those two paragraphs of what would be, in the  
12 view of the agent, based on the agent's review of all of  
13 evidence at that point in time, appropriate to review on the  
14 phone. And, therefore, it would be appropriate in an  
15 overbreadth analysis to limit the types of data that can be  
16 searched to specifically those types of data that were outlined  
17 in the affidavit.

18 THE COURT: OK. Thank you.

19 Mr. Schachter?

20 MR. SCHACHTER: Yes. With respect to the search of  
21 Mr. Gatto's phone, we believe that that search was also  
22 violative of his rights. Mr. Gatto was handcuffed and he had  
23 already invoked his right to counsel when the FBI agent asked  
24 for his pass code.

25 THE COURT: That's his version. There's a proffer by



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1 the government that that's not exactly what happened, right?

2 MR. SCHACHTER: Well surely there is no  
3 counteraffidavit. And so -- and the government concedes, I  
4 believe, that they accept for purposes of this argument, they  
5 accept Mr. Gatto's declaration as true. So I don't know that  
6 there is any meaningful dispute as to what happened.

7 Furthermore --

8 THE COURT: Don't they, or do I misremember, reserve  
9 the possibility that if I thought it relevant they would put  
10 forth testimony?

11 MR. SCHACHTER: I believe the government to have  
12 suggested something to that effect. However, they also say for  
13 purposes of this motion they concede the accuracy of  
14 Mr. Gatto's declaration.

15 Perhaps more importantly in their description of the  
16 facts they specifically -- I don't think they do dispute that  
17 Mr. Gatto had invoked --

18 THE COURT: What they said they conceded, they said  
19 they conceded for purposes of the brief. Not the motion.

20 MR. SCHACHTER: I would submit that if the government  
21 wished to put forth a different set of facts or contradict what  
22 Mr. Gatto had to say that the time to have done so would have  
23 been in response to our motion to suppress when we put forth an  
24 affidavit. If the government does not put forth a  
25 counteraffidavit which, of course, I don't know why they

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1 wouldn't if they disputed the facts, they had every opportunity  
2 to submit a counteraffidavit to your Honor and chose not to. I  
3 would assume -- regardless of what the government says, it  
4 seems like having failed to put forth a counteraffidavit that  
5 for purposes of this motion the declaration is to be taken as  
6 true.

7 More importantly though, your Honor, I think even in  
8 the text of their brief I don't think they dispute the  
9 following facts. I do not believe there is a dispute --  
10 although we'll hear from the government in a moment -- I don't  
11 believe there is a dispute that Mr. Gatto was handcuffed. I  
12 don't think there is a dispute that he invoked his right to  
13 counsel. And I don't think that there is a dispute that while  
14 handcuffed and after he invoked his right to counsel the FBI  
15 agent asked for his pass code, quote, and I'm quoting now the  
16 government, the purpose of that. They say, and it's in a  
17 footnote, they say that the purpose of that question was "to  
18 confirm that the agent had correctly observed the pass code  
19 that he believed he had seen Mr. Gatto's wife enter earlier."

20 So I don't -- based on that footnote I anticipate that  
21 the government concedes that while handcuffed and after he had  
22 invoked, the agent asked Mr. Gatto to reveal his pass code and  
23 that he did so for a purpose.

24 THE COURT: You took that so far out of context that  
25 it's not even funny. So let's move along. You're just ignored

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1 the sentence before that.

2 I mean you really have to assume, Mr. Schachter, that  
3 I've read the material.

4 MR. SCHACHTER: I certainly apologize, your Honor, if  
5 I'm mistaken about that. I certainly read that to mean that  
6 the agent asked Mr. Gatto to reveal his pass code.

7 THE COURT: Yeah, he did, right after Gatto said to  
8 the agent turn the phone off.

9 MR. SCHACHTER: Well.

10 THE COURT: And after the agent had observed him enter  
11 the password earlier in the day. Big deal.

12 MR. SCHACHTER: Well, your Honor, you don't need a  
13 pass code in order to silence an iPhone. There's buttons on  
14 the side. There's simply a button to the right. Nobody needs  
15 to enter the pass code in order to silence the phone.

16 So I submit that that seems like an odd position for  
17 the government to take if they're actually going to call the  
18 agent to suggest that the reason why he asked --

19 THE COURT: Do me a favor. You may think it's an odd  
20 position but don't tell me their position is they've conceded  
21 the facts on the motion. Because if you do that it seems to me  
22 I'm entitled to accept that if the government tells me that  
23 your position is something that isn't your position.

24 MR. SCHACHTER: I apologize, your Honor. I understood  
25 the government's position that the agent asked in order to

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1 confirm the pass code.

2 THE COURT: I assume everybody in this case is  
3 operating in good faith. I don't do otherwise. I also  
4 practiced law long enough to know one gets excited about an  
5 argument and makes mistakes. Fine. No harm. No foul. Now  
6 move on.

7 MR. SCHACHTER: Your Honor, the moment that Mr. Gatto  
8 had invoked, the government should not be asking him questions  
9 that have an investigative intent.

10 And perhaps there is a dispute as to whether or not  
11 that question was asked with an investigative intent. I  
12 understood the government to say that when the agent was asking  
13 to confirm the pass code that that was to learn the pass code.  
14 And we submit, your Honor --

15 THE COURT: And the agent says for the purpose of  
16 shutting off the phone. And maybe he didn't understand how the  
17 phone worked. Who knows?

18 But it seems to me that unless your procedural default  
19 argument has legs -- and I'm not passing judgment on that  
20 now -- there needs to be a hearing on that issue, doesn't  
21 there?

22 MR. SCHACHTER: The argument would be a procedural  
23 default one. It would be that if the government wished to  
24 contest that fact, then they should have put in a  
25 counteraffidavit and they didn't.

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1 THE COURT: I understood that argument. That's your  
2 procedural default argument. It has legs or it doesn't. I  
3 understand it.

4 MR. SCHACHTER: Certainly if the government had put  
5 forward a declaration I believe that said that the purpose that  
6 I had asked for that pass code, then we may need a hearing.

7 THE COURT: Mr. Schachter, let's move on. It's a  
8 quarter to five. This is the first of four motions and we have  
9 to move through it with some dispatch.

10 MR. SCHACHTER: Yes, your Honor.

11 It's our position that this was a question asked in  
12 custodial interrogation with investigative intent and for that  
13 reason the exclusionary rule applies and the evidence from the  
14 search of the phone should be suppressed.

15 THE COURT: Understood.

16 Thank you. Anybody else on the defense side on this?

17 All right. Government.

18 MR. DISKANT: Just one moment, your Honor.

19 (Pause)

20 MR. DISKANT: Ms. Flodr will handle argument for the  
21 government.

22 THE COURT: So, Ms. Flodr, while you're making your  
23 way to the lecturn let me tell you what your time will be best  
24 be spent on.

25 I am somewhat troubled by the language that I read to

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1 Mr. Schachter that he construes as a general warrant. I am  
2 less concerned but not unconcerned about his probable cause  
3 argument. I'm less concerned because it seems to me I don't  
4 see how he gets around the good faith argument, at least right  
5 now. I am concerned about why the government didn't put in an  
6 affidavit on the Miranda point and whether I shouldn't hold you  
7 to that.

8 MS. FLODR: Thank you, your Honor.

9 I will start with the overbreadth argument that  
10 Mr. Schachter has made to this Court thus far.

11 As your Honor is well aware, incorporated as part of  
12 each of these search warrant affidavits, the contents of these  
13 calls were detailed in excruciating detail, which  
14 unquestionably established that the calls pertained directly to  
15 and helped further the charged crimes.

16 As the defendants know and they point out, phones,  
17 including smartphones like the ones, most of ones that were  
18 seized here, are not just used to make phonecalls, which is  
19 precisely the point for seeking the search warrants in the  
20 first place. The fact that those phonecalls are heard and the  
21 contents of those phonecalls are known, all of that leads to  
22 the reasonable inference that evidence would be left behind of  
23 those phonecalls. All of the information about these  
24 phonecalls are embedded in those phones. The phone --

25 THE COURT: Maybe that gets you into the call logs and

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1 stuff like that but why does it get you into photographs?

2 MS. FLODR: Your Honor, with respect to photographs  
3 the way that the defendants have articulated this point is that  
4 digital media is somehow able to be parsed completely  
5 separately into delineated categories, that your photographs  
6 appear in one specific location and is stored just like that.  
7 But that's not how the Second Circuit has even recognized that  
8 that is how electronic media that is stored on your phone is  
9 actually stored and can be searched in that proper way.

10 For example, take a contact list, just someone's  
11 contact in a smartphone. That is not just someone's textual  
12 information like their e-mail address that's associated with  
13 that contact. That contact can also include all of the  
14 photographs that have ever been sent back and forth between  
15 that contact and the user of the cellphone.

16 THE COURT: What's the evidentiary support for that  
17 proposition?

18 MS. FLODR: For that proposition. Your Honor, I think  
19 in terms of how the media is stored in these phones, you can't  
20 separate out: Oh, I'm just looking for the textual information  
21 associated with that contact. The media is not -- doesn't lend  
22 itself to that kind of information separation.

23 THE COURT: But I'm asking you where is the  
24 evidentiary support for how these gizmos work and store  
25 information and why it is that on showing of probable cause

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1 with respect to the content of telephone calls makes it  
2 reasonably likely, or whatever the precise test is, that you  
3 need to look at other things there beside the call log, to take  
4 an example.

5 MS. FLODR: Your Honor, at this point we'd have to put  
6 in an affidavit from someone who is an expert in the field of  
7 how this data is actually stored on each of these phones. Each  
8 of those phones in this case were not all iPhones. There was  
9 also a BlackBerry, and there was also a flip phone. A flip  
10 phone in this case, we were able to take down all of the call  
11 logs and the messages associated that were -- the contact list  
12 associated with that phone. And that's like the type of media  
13 that was stored on that phone. But with respect to the other  
14 phones we would have to put in an affidavit at this point to  
15 explain how the media is stored on each of these phones.

16 THE COURT: Where does the burden lie on this?

17 MS. FLODR: Your Honor, it's our burden to show how  
18 this data is stored and how we would execute -- one moment,  
19 your Honor.

20 (Pause)

21 Your Honor, after conferring with cocounsel in this  
22 case it is the defendant's burden to show that there is a  
23 problem with the way that these phones have been executed. And  
24 the government is very happy, if necessary, to put in an  
25 affidavit about how these phones maintain this data and the



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1 difficulties in separating out the data in the way that the  
2 categories that the defendants have described to be parsed out  
3 in the very specific manner that they have suggested.

4 THE COURT: Why shouldn't I give both sides the  
5 opportunity to put in affidavits on this point?

6 Mr. Schachter.

7 MR. SCHACHTER: Well, your Honor, I think that the  
8 time -- the question as to whether or not this warrant is  
9 overbroad is what information was provided to the magistrate at  
10 the time that the search warrant was sought. I think whether  
11 or not the government can put forth an affidavit today is  
12 really not -- that doesn't answer the question as to whether or  
13 not the warrant was overbroad.

14 THE COURT: Well I'm not sure you're right about that.  
15 Let's just work through this.

16 I'm looking at Exhibit 1 and we have the affidavit of  
17 the agent to which is attached Exhibit A, which I take to be an  
18 exhibit to the agent's affidavit, right? Any disagreement  
19 about that?

20 (Pause)

21 And, in fact, we don't even have to go that far.  
22 Because we can go to paragraphs 14 and 15 of the application,  
23 and 16, especially 16, which says that in order to determine  
24 whether they've got all the data responsive to the warrant they  
25 may have to look at everything. And then in -- attached on A,

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1 after giving specific techniques that they propose to use, talk  
2 about it perhaps being necessary for the purpose of determining  
3 what data is responsive to the warrant to look at other things.  
4 So, that goes to the probable cause to look at everything.

5 There's at least an implication, and maybe a direct  
6 statement, that in order to execute the warrant properly they  
7 have to look more broadly.

8 Now, you're challenging that. You haven't put in an  
9 affidavit explaining why that's wrong. Begins to border on a  
10 Franks issue, although I don't suppose anybody was up to no  
11 good in that sense.

12 If you don't want an opportunity to put in more proof,  
13 I'll act accordingly.

14 MR. SCHACHTER: Your Honor, I don't think we need an  
15 opportunity to put forth a declaration because I don't think we  
16 dispute that evidence of criminal activity can theoretically be  
17 found anywhere on a phone. And I don't dispute that if the  
18 objective of the government is to search for any evidence of  
19 criminality that exists anywhere on a phone, then they would --  
20 they may wish to search the entirety of the electronic data.  
21 The evidence can be hidden in lots of different places. I  
22 don't think we dispute that.

23 I think the issue is that when you're talking about  
24 electronic data, that the government needs to come forward to  
25 the magistrate with more than that. They need to be able to

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1 say that there -- here is the particular pockets of electronic  
2 data that we believe there's probable cause to believe that  
3 there will be found evidence of criminality or in the  
4 circumstances of Ulbricht which both sides have cited, which is  
5 the Silk Road case, the courts have said there was permission  
6 to search the entirety of electronic data on a laptop because  
7 the evidence presented by the government was that the laptop  
8 was permeated with fraud. That is absent -- absent something  
9 in the declaration, which is submitted to the Court, which says  
10 that this cellphone is permeated with fraud. By virtue of the  
11 nature of this crime, we can anticipate that there would be  
12 criminal activity throughout all the nooks and crannies of this  
13 phone, which I don't think the government even suggests that  
14 they have.

15 When they're talking about electronic data the  
16 government needs to do more otherwise that warrant is  
17 overbroad. What they should have done is what Mr. Bernard  
18 suggests, which is they should have limited this warrant to  
19 particular categories of data for which they are able to come  
20 forward with probable cause to believe that there is going to  
21 be evidence that will be found, not might be. Surely the  
22 government can come forward with a declaration saying it might  
23 be lots of places. But that's not the test.

24 THE COURT: Does the government want an opportunity to  
25 put in an affidavit if the defense doesn't?

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1 MS. FLODR: If your Honor would like one, we're happy  
2 to submit one.

3 THE COURT: Two weeks enough time?

4 MS. FLODR: Yes, your Honor.

5 THE COURT: All right. You may do so.

6 Now what about the lack of an affidavit on the  
7 password?

8 MS. FLODR: Your Honor, the government submits that  
9 even based on the evidence as put forth in the Gatto affidavit,  
10 the facts as put forth there, as we said, still does not amount  
11 to custodial interrogation in the way that custodial  
12 interrogation has been defined in the jurisprudence.

13 In this case, and also in all of the other cases that  
14 the defendants cite, contrary to the facts of this case, the  
15 agents in those cases were very clearly initiating  
16 communications with each of the defendants after they invoked  
17 their right to counsel, multiple times on some occasions, with  
18 the very clear purpose of trying to undermine the protections  
19 of Miranda to obtain evidence for their cases and for their  
20 investigations.

21 That is not what happened here, even based on the  
22 facts that are put forth in the Gatto affidavit.

23 What happened here is that hours after Gatto had  
24 invoked his right to counsel and questioning had indisputably  
25 ceased, Mr. Gatto's cellphone began to ring. Reacting to that

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1 ring the agent asked Mr. Gatto for his password, a question  
2 that Mr. Gatto responded to. There is no allegation that the  
3 agent engaged in any kind of police misconduct or coercive  
4 tactics to obtain that password from Mr. Gatto. It was simply  
5 a reasonable question, greeted with a reasonable response from  
6 Mr. Gatto.

7 The notion that there might be some investigative use  
8 to the response does not render that question a product of  
9 custodial interrogation.

10 THE COURT: So, is the government standing or falling  
11 on this motion on Mr. Gatto's version of the facts?

12 MS. FLODR: Your Honor, yes. We are --

13 THE COURT: So which one, standing or falling?

14 MS. FLODR: We believe that even under the Gatto facts  
15 as alleged in the Gatto affidavit that there is still not --  
16 there are no allegations and there are no facts before this  
17 Court that would suggest that this was custodial interrogation.

18 THE COURT: So your view is if I conclude there's  
19 enough there it's suppressed?

20 MS. FLODR: Your Honor --

21 THE COURT: On his version of the facts.

22 MS. FLODR: For this statement, if the Court does  
23 conclude that it was custodial interrogation for Mr. Gatto to  
24 respond, then the statement itself, Mr. Gatto's response with  
25 his password, would be suppressed, but not the fruits thereof.

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1 THE COURT: OK. I think I have your position on that.  
2 Anything else on this particular motion?

3 MS. FLODR: Not from the government, your Honor.

4 THE COURT: Thank you.

5 Any response from the defense?

6 MR. SCHACHTER: No, your Honor.

7 We'd ask for an opportunity to the extent the  
8 government submits an affidavit within two weeks we'd -- I  
9 don't know that we'll need to but I would like an opportunity  
10 to submit some kind of written response. I don't know that  
11 there would be an affidavit but I don't know what this  
12 affidavit is going to look like and so to the extent necessary  
13 we'd like an opportunity to put in a responsive writing.

14 THE COURT: Sure. You have a week for that.

15 MR. SCHACHTER: Thank you, your Honor.

16 THE COURT: The motion to suppress the wiretaps  
17 pursuant to the April 7 order and extensions.

18 MR. DISKANT: Your Honor, just so the record is clear  
19 I presume Ms. Donnelly is representing, that Mr. Haney has  
20 consented to her making the argument on his behalf.

21 THE COURT: Thank you for noting that. That's right,  
22 right, Ms. Donnelly?

23 MS. DONNELLY: That's correct.

24 THE COURT: OK. Fire away.

25 MS. DONNELLY: Your Honor, Mr. Dawkins' application is

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1 straightforward and it is based on the text of the statute  
2 Title III as well as Supreme Court precedent. Title III  
3 Section 2518(4)(d) requires that every court order authorizing  
4 a wiretap must identify by name the justice department official  
5 who approved the wiretap request.

6 This information is clearly missing from the April 7  
7 wiretap.

8 THE COURT: Let me ask you this question. Suppose the  
9 authorizing official was Jones and the order said Smith. Where  
10 does that come out?

11 MS. DONNELLY: If Jones is -- excuse me. If Smith  
12 himself is an authorized individual, meaning that both Smith  
13 and Jones had authority to authorize the government's request,  
14 then the order is facially sufficient and there is no basis for  
15 suppression.

16 THE COURT: How the do we know that it's facially  
17 sufficient, simply because we know the name Smith?

18 MS. DONNELLY: As I understand the Supreme Court's  
19 precedent on this, and the case that most directly speaks to  
20 your Honor's question is United States v. Chavez, the question  
21 is if -- if you were just to simply look at the order and you  
22 saw that it seemed to have the name of a justice department  
23 official who's named there, it doesn't seem to be missing any  
24 other information --

25 THE COURT: How does the order with the name Smith,

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1 the incorrect name, Smith, tell you that Smith is, in fact, a  
2 justice department official? It's just a name, right?

3 MS. DONNELLY: Correct. But in each of the orders the  
4 government is also required to say that -- to say Smith's  
5 title. So he is the acting assistant -- the assistant attorney  
6 general or he's the acting assistant attorney general. And in  
7 that -- if he was identified as such, a reader of the order  
8 could reasonably understand that he had authority and he  
9 approved the request.

10 THE COURT: Now, was there a title in this order?

11 MS. DONNELLY: Yes, there was.

12 THE COURT: So how do we know that Fill isn't the name  
13 of a justice department official?

14 MS. DONNELLY: Well, because Fill In is in all  
15 capitals.

16 THE COURT: Doesn't it say just Fill?

17 MS. DONNELLY: No. It says Fill In. And also it's  
18 spelled F-I-L-L versus P-H-I-L.

19 THE COURT: Yes. And I've met some people with very  
20 odd names in my life.

21 MS. DONNELLY: I believe that the government has  
22 conceded that Fill In is not the name of a government official.

23 THE COURT: No. My hypothetical presupposes that.

24 MS. DONNELLY: OK. Well if, in fact, there was an  
25 acting deputy assistant Attorney General whose name truly was



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1 Fill In, but, in fact, this application was approved by  
2 Mr. McFadden, then the April 7 order would be sufficient on its  
3 face.

4 THE COURT: But it's sufficient on its face only by  
5 reference to facts extrinsic to it; that is to say, the fact  
6 that Fill In really was the name of an authorized justice  
7 department official, true?

8 MS. DONNELLY: That's correct.

9 THE COURT: So, we can't take this notion of  
10 sufficient or insufficient on its face to its logical extreme  
11 no matter what.

12 MS. DONNELLY: I would agree with you there although I  
13 would argue that in this circumstance I don't believe we're  
14 taking it to an extreme. In fact, we're asking this Court to  
15 find exactly as the D.C. Circuit did in United States v.  
16 Scurry.

17 THE COURT: I know that. And if the Second Circuit  
18 had so concluded, I would happily do so. But it seems to me  
19 that that decision in the D.C. Circuit is probably wrong.

20 MS. DONNELLY: Well your Honor --

21 THE COURT: With all respect.

22 MS. DONNELLY: By all means, if I may try to persuade  
23 you differently, footnote 14.

24 THE COURT: I mean I stand with Sergeant Bumble here.  
25 To reach that conclusion is to exalt form over substance to an

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1 outrageous degree, isn't it?

2 MS. DONNELLY: I don't believe so. And there's a  
3 number of reasons why that is. And the D.C. circuit said it  
4 more articulately than I will.

5 THE COURT: I'm not sure that's going to be true.

6 MS. DONNELLY: The order identification requirement  
7 was mandated by Congress because Congress intended for the  
8 agent or the telecommunications official, whoever it is, that  
9 is receiving this order, he or she needs to be able to look at  
10 it and say, yes, this has every t is crossed every i is dotted.

11 THE COURT: So they're supposed to do research, right?

12 MS. DONNELLY: Well I don't think that they're  
13 supposed to do research. But I do believe, as I understand the  
14 legislative history, Congress really did intend for a  
15 telecommunications official or other agent to confirm for  
16 themselves that the order was appropriate. It's part of --

17 THE COURT: That's the whole point. It can't be done.  
18 It doesn't make any sense if it read it literally. And the  
19 reason it can't be done is that unless you happen to have a  
20 telephone company official who has memorized the organization  
21 chart of the U.S. Department of Justice that person has  
22 absolutely no idea from the fact that there's a name that  
23 precedes deputy assistant attorney general whatever, in fact,  
24 is such a person. It's not available on the face of the order.

25 MS. DONNELLY: Well let me ask you to look at it a

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1 slightly different way.

2           So, for example, in Scurry and I think here as well,  
3 in Scurry there was asterisk, and here we have brackets and  
4 then fill in. So any reasonable person who is looking at this  
5 is not wondering whether fill in or asterisks is possibly a  
6 government official.

7           THE COURT: Right. But let me ask you to look at it  
8 from a different way.

9           MS. DONNELLY: By all means.

10           THE COURT: Suppose it says J. Walter Thompson,  
11 Assistant Attorney General, and in fact there is no J. Walter  
12 Thompson who is an assistant attorney general, and you're  
13 saying that Congress's purpose is served because anybody who  
14 looks at it, and no matter whether the name is a real name, a  
15 fictitious name, a name of somebody who works for the justice  
16 department, a name of somebody in the road company of some  
17 Broadway show, they're supposed to glean from the fact that  
18 there is a name that it's actually an authorized official.  
19 That's -- that doesn't make any sense to me.

20           MS. DONNELLY: I would disagree with you only here,  
21 because in that instance I believe the telecommunications  
22 provider would be -- he would be -- it would be very reasonable  
23 for him to assume that Mr. McLaughlin, or whatever name you  
24 just used, that he was, in fact, a real official. And then the  
25 defendant would then argue that because Mr. McLaughlin is not

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1 employed by the justice department at all, that, in fact, the  
2 order is insufficient under subsection one, right; that, in  
3 fact, that we have a problem where the communications were  
4 intercepted illegally, unlawfully. That's not what we're  
5 moving on here.

6 Here we are saying this is a facially insufficient  
7 order, and that is a slightly different argument that would  
8 apply in your Honor's hypothetical.

9 THE COURT: The order refers to, it says it is entered  
10 on the basis of the application. And the application has the  
11 right official. It has the right letters of authority and  
12 delegation. And it's all there.

13 MS. DONNELLY: True.

14 But I would respond again by pointing your Honor to  
15 what the D.C. Circuit said in Scurry and what the Supreme Court  
16 said in Giordano which is the order is the operative document.  
17 The Verizon provider who is putting together the government  
18 stuff, they don't have the application.

19 And I would also point to the D.C. Circuit explanation  
20 of the fact that there was really two different requirements  
21 here. We have an application identification requirement, which  
22 helps the magistrate or the district judge assure themselves  
23 that the government is complying with Title III, and then there  
24 is the order identification requirement. And they really are  
25 distinct propositions.

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1           THE COURT: Look, the overall purpose is that there  
2 should not be a Title III interception unless it is duly  
3 authorized. And there is just no way anybody in his right mind  
4 could say this was not duly authorized. And you don't say so,  
5 to your credit.

6           What you have done is seized on poor Mr. Fill In and,  
7 you know, you're saying what amounts to a piece of sloppiness  
8 by somebody in the U.S. Attorney's Office that has affected  
9 nobody's substantial rights whatsoever and said, in the public  
10 interest here do something that will potentially give serious  
11 criminals -- that's what they're alleged to be anyway, we'll  
12 see -- a free pass.

13          MS. DONNELLY: Do you mind if I respond just very  
14 briefly.

15          THE COURT: I don't mind. Of course not. This  
16 argument -- it's not as overdrawn -- your argument is not as  
17 overdrawn. I take it seriously. But I once sat on a panel in  
18 the Court of Appeals where we had an appointed lawyer seeking  
19 reversal of a criminal case and the argument was that the guy  
20 in jail who was convicted by a jury was the wrong guy. How do  
21 we know this? We know this because the inmate swore that he  
22 never puts his name in writing in solid capital letters. And  
23 the person named in the indictment by the same name, all in  
24 capital letters. So the presiding judge of the panel -- I will  
25 not identify who it was -- exploded with impatience about what

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1 a foolish argument this was. And the lawyer, to his enormous  
2 credit, said: Your Honor, I didn't ask for this case. You  
3 appointed me to argue this case, and I'm doing the best I can.  
4 And I appreciate you're doing the best you can, Ms. Donnelly.

5 You have a tough audience on this one. Sorry.

6 MS. DONNELLY: I would say, however, that I don't  
7 believe the argument is just mine or Mr. Dawkins'. I believe  
8 that the solicitor general has also taken the same --

9 THE COURT: I read those papers. I did. I'm aware of  
10 that.

11 MS. DONNELLY: And in light of your comments with  
12 Mr. Schachter, I assume that you disagree with the way that we  
13 characterized the solicitor general.

14 THE COURT: I'm going to look carefully at what the  
15 solicitor general had to say again and I will also, no doubt,  
16 reflect on the proposition I learned a great many years ago at  
17 a law school up in Cambridge that estoppel never runs against  
18 the government and what application it might have here. But I  
19 understand your point on that.

20 MS. DONNELLY: Would your Honor like to hear from me  
21 on the questions of whether the good faith exception applies or  
22 whether the independent source analysis is appropriate or no?

23 THE COURT: Whether the independent, what did you say?

24 MS. DONNELLY: The independent source analysis.

25 We argue that the subsequent wiretap orders, those

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1 beyond the April 7 order, are tainted, they are derivative  
2 evidence.

3 THE COURT: Right. I don't think I need to hear  
4 argument on that but I appreciate your argument and I thank you  
5 for it and admire your courage.

6 MS. DONNELLY: Thank you.

7 THE COURT: The Brady motion. Mr. Schachter.

8 MR. DISKANT: Your Honor, just before we move on I  
9 wanted to offer, if the Court has questions, we're happy to  
10 address them particularly but if --

11 THE COURT: I don't think we're going to take more  
12 time on that one.

13 MR. DISKANT: Thank you.

14 MR. SCHACHTER: Thank you, your Honor. Does your  
15 Honor have a preference as to which motion -- which Brady  
16 motion we address first, whether we speak of the evidence of  
17 the conduct of the agents or whether we address our request for  
18 additional witness statements?

19 THE COURT: Witness statements.

20 MR. SCHACHTER: Yes, your Honor.

21 Well, your Honor, our argument is that we identified a  
22 number of -- let me backup. It can be difficult sometimes for  
23 the government to anticipate what exactly the defenses are  
24 going to be. So in an effort --

25 THE COURT: I'm sure they're eternally grateful to you

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1 for pointing them out.

2 MR. SCHACHTER: We're here to serve.

3 THE COURT: Good for you.

4 MR. SCHACHTER: Because we wanted the government to  
5 have a better idea of what our position is so that they will be  
6 able to scour their record and identify whether or not they  
7 have evidence that could be material to the defense or could be  
8 exculpatory. And we are in a better position to make that call  
9 than the government is, we submit.

10 So we tried to identify exactly what it is we're  
11 looking for. We have no doubt, or I should say it is great  
12 likelihood that if there is a document, other than a witness  
13 statement, we would anticipate that if the government has  
14 received documents, that they have turned around and produced  
15 those to us. We think that it is likely, although we don't  
16 know for sure, we believe it is likely that to the extent the  
17 Brady evidence exists in the hands of the government it will be  
18 in statements which have been made by witnesses to them during  
19 the course of their investigation. And, indeed, we do know  
20 that there have been statements that have been made to the  
21 government that are exculpatory.

22 For example, we know that Brad Augustine, who was  
23 formerly a defendant in the complaint, has -- it's -- the  
24 government has disclosed in a summary fashion to us,  
25 paraphrased by the AUSA, they have summarized that



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1 Mr. Augustine says that, in fact, he was not in on the scheme  
2 that is alleged in the indictment. In fact, there was not  
3 going to be any payment that was going to be made to  
4 Mr. Little. But effectively he was, in his own scheme to rip  
5 off Mr. Gatto, Dawkins, and Code, at least that's what I glean  
6 from the government's disclosure.

7 Given that disclosure, we submit that nearly every  
8 word that Mr. Augustine likely told the government is  
9 exculpatory and, therefore, we don't know why the government  
10 would insist on only providing some kind of paraphrased  
11 retelling of what they learned from Mr. Augustine as opposed to  
12 the 302 that would actually capture the words, which do --  
13 which may make a very big difference.

14 THE COURT: And in due course if they call him you  
15 will get it. And it's conceivable you'll get it in our  
16 circumstances. But, I don't get why you need it now.

17 Need is not the right word. Why you're entitled to it  
18 now.

19 MR. SCHACHTER: As Judge McMahon said that the  
20 timeliness of Brady disclosures is the minute that the  
21 government receives them. There is no reason for delay.

22 THE COURT: With all due respect to my colleague and  
23 former partner, that's just not what the Supreme Court has  
24 said. What the Supreme Court has said is that you're entitled  
25 to Brady material in sufficient time to make use of it. I

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1 paraphrase, but it's close enough for my purpose.

2 We are at least six months away from trial. You know  
3 all about Mr. Augustine. You know in summary what he said.  
4 And I don't understand why you're entitled to a witness  
5 statement.

6 MR. SCHACHTER: Your Honor, I agree that the test for  
7 this is really when we can make timely use of it. Certainly  
8 the courts have encouraged the government not to play that  
9 close to the edge and have encouraged them to make early  
10 disclosure. And I submit that when the government has evidence  
11 which is, at least with respect to Mr. Augustine, clearly  
12 exculpatory, there is no reason for them to delay. I don't  
13 know what the reason would be -- certainly they can protect --

14 THE COURT: One reason may be that you're not entitled  
15 to it.

16 MR. SCHACHTER: Mr. Augustine's statement as  
17 summarized by the government is directly -- directly  
18 contradicts the allegations of the indictment. And so it would  
19 be hard to believe that anything he said, at least if the  
20 summary of what the government provides is accurate, then he is  
21 saying that's -- that many of the allegations of the indictment  
22 are untrue. And so --

23 THE COURT: Many? Where did that come from?

24 MR. SCHACHTER: Well the entire portion relating to  
25 the University of Miami scheme lays out a scheme that includes

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1 Mr. Augustine and alleges that Mr. Augustine is speaking -- is  
2 in a conspiracy with the defendants to get money from --

3 THE COURT: And he's said I'm not part of any such  
4 thing in substance, right?

5 MR. SCHACHTER: Correct.

6 And I submit that given the fact that his statements  
7 would be inconsistent.

8 THE COURT: How do you know what else they talked to  
9 him about?

10 MR. SCHACHTER: We do not, your Honor.

11 THE COURT: You do not. Are you entitled to know  
12 other things they talked to him about?

13 MR. SCHACHTER: To the extent that it is exculpatory,  
14 yes.

15 THE COURT: Now, suppose they went on about whatever  
16 he might know about the University of Louisville or about  
17 Southern Cal or something else, suppose they talked to him  
18 about lots of things, none of which, perhaps, is exculpatory of  
19 anybody. Maybe the answers are I don't know. Maybe what I  
20 heard about what happened at Louisville is the following.

21 Why are you entitled to use to, to use your words,  
22 rummage through their files in the hopes that you'll find  
23 something?

24 MR. SCHACHTER: As is always the case for defense  
25 counsel that is seeking Brady evidence, we don't know what the

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1 government has, of course.

2 THE COURT: Right.

3 MR. SCHACHTER: What we're asking for is given the  
4 government's disclosure, that the Court -- that the Court  
5 direct the government to examine these statements and in  
6 particular with respect to the portion that is, according to  
7 the government's summary, inconsistent with the indictment,  
8 that we get not the government's retelling but we get the words  
9 that Mr. Augustine used.

10 THE COURT: Let's take what you said one at a time.  
11 They said they're very conscious of their obligations and, of  
12 course, they're going through whatever they have.

13 Not good enough for you?

14 MR. SCHACHTER: Candidly, no, your Honor. I think  
15 we're entitled to not to Mr. Diskant's summary of what  
16 Mr. Augustine says.

17 THE COURT: That's a different question. You said two  
18 things.

19 You said it's not good enough for you that they say  
20 they're going through everything. You want me to tell them to  
21 go through everything, and then come back. And what do you  
22 think the odds are they're going to say: We did it again.  
23 Here's what we have to say. What do you think the odds of that  
24 are? 99 percent? A hundred percent? What's the point of it?

25 So then we get to the second part. And the second

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1 part of what you've said is: OK. Witness said something  
2 exculpatory and they've told us in substance what it is. Now  
3 we want to see everything he told them on any subject  
4 exculpatory or not. That's your position here. I don't see  
5 the justification for it.

6 MR. SCHACHTER: Let me pull back and reconsider that  
7 position.

8 Certainly what I should say, your Honor, is that to  
9 the extent that Mr. Augustine made exculpatory statements, we  
10 would like the words that he used as opposed to the  
11 government's retelling.

12 THE COURT: Suppose they don't have the words that he  
13 used? Suppose there are: A, notes of an agent or an  
14 assistant, sketchy notes. Suppose what they have is a  
15 recollection of what he says. Suppose, case three, they have  
16 an affidavit signed by him. Those are three totally different  
17 cases, aren't they?

18 MR. SCHACHTER: Yes, your Honor.

19 And with respect to -- to the extent that the agents'  
20 recollections as recorded in the FBI 302 is different in the  
21 words that Mr. Diskant provided to us in his letter, then we  
22 believe that we would be entitled to the agents' recollection  
23 as recorded in that memoranda.

24 THE COURT: Under what authority?

25 MR. SCHACHTER: Under several. First, simply Brady.

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1 If words are exculpatory, then Mr. Diskant has one version of  
2 those words and the agent, as recorded in his 302 has another  
3 version, then both would -- to the extent they're both  
4 exculpatory, unless one says something completely different,  
5 then both of those versions are exculpatory and there is no  
6 reason for the government to withhold that. That should be  
7 turned over to us promptly. And certainly, as your Honor  
8 states it, in time for us to make effective use of it at trial.

9 THE COURT: So you know who Mr. Augustine is. You  
10 probably, at least in a figurative sense, know where he lives.  
11 You can go talk to him. You can find out what he says are the  
12 facts. No different than any other case.

13 What's the problem?

14 MR. SCHACHTER: Your Honor, I believe that the  
15 government is obligated to do more than that.

16 THE COURT: I know. That's the conclusion. But where  
17 is the reasoning?

18 MR. SCHACHTER: The reasoning is that to the extent  
19 they've spoken to a witness who has made exculpatory  
20 statements, has been disclosed to us, that we are entitled to  
21 more than just the summary of Mr. Diskant's version.

22 Judge Rakoff in United States v. Gupta spoke of the  
23 fact that when multiple witnesses hear a statement then each of  
24 those versions may be independently probative of what that  
25 witness had to say. We believe that we're entitled to not just

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1 the summary but also the FBI agents' 302 or any other recording  
2 of those statements.

3 THE COURT: No matter how much it says on other  
4 subjects?

5 MR. SCHACHTER: No. Your Honor pointed out correctly  
6 that that is an overbroad statement. To the extent he said  
7 things that are not exculpatory, we're not entitled to those.

8 I only ask for the statements which he made which were  
9 exculpatory.

10 THE COURT: Well but that's not what your motion is.  
11 I understand you've receded from your motion.

12 Now, I've looked at your papers and it's not all just  
13 obviously about Mr. Augustine. What you've essentially tried  
14 to do here is to serve interrogatories and Rule 34 notices that  
15 would due credit to a plaintiff in a securities class action.  
16 You want everything. You want their whole file. And I don't  
17 see why it's my job to go through this grotesquely overbroad  
18 set of requests and draft them for you, frankly, especially on  
19 a Brady theory where the Second Circuit has said I'm in no  
20 position to make determinations as to Brady before trial.

21 MR. SCHACHTER: What we attempted to do, and I  
22 certainly recognize that there are many of them, many such  
23 requests. What we attempted to do is identify the kind of  
24 information that we thought were exculpatory to assist the  
25 government in complying with its obligations.

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1           THE COURT: There is no problem with that and I was  
2 serious when I said they, no doubt, are grateful to you for it.  
3 Maybe I was being a little ironic, but nonetheless it's in your  
4 interests to do that.

5           But the question whether it's in your interests to do  
6 it and whether it's useful to the government to know in advance  
7 what it is you think might be exculpatory so they don't  
8 inadvertently fail to produce some Brady material, it's no  
9 doubt that's all helpful.

10          But you're asking me to turn the way the Brady rule  
11 works, at least in this circuit, upside down and to decide  
12 pretrial what is exculpatory in circumstances where I don't  
13 fully know your case. I wouldn't even if I spent time reading  
14 your interrogatories and document notices, so characterized by  
15 me, and then stop doing the rest of my job to look through the  
16 government's whole investigative file for the next who knows  
17 how many weeks or months. That's not my job.

18          MR. SCHACHTER: I understand, your Honor.

19          I suppose that our hope would be that the Court would  
20 direct the government to identify whether -- to the extent that  
21 your Honor agrees that the items that we have identified would  
22 fall within the definition of exculpatory, that the Court would  
23 direct the government to at least tell us whether it exists.  
24 Because we don't know whether there are such witness statements  
25 or there are not.



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1 THE COURT: Look, which definition of exculpatory  
2 should I use?

3 Doesn't it boil down to whether the evidence is so  
4 dramatic that it would do something like show that a conviction  
5 would be an injustice? Isn't it something like that. I can't  
6 cite it from memory.

7 MR. SCHACHTER: Your Honor, I think it would be that  
8 there would be a reasonable probability that the outcome may be  
9 different or that it would cast evidence in a different light.

10 THE COURT: How am I supposed to do that before trial?

11 MR. SCHACHTER: Your Honor --

12 THE COURT: Take Mr. Augustine. For all I know he's  
13 going to cooperate with you, he's going to come in here and  
14 he's going to testify, if it's relevant and admissible, to  
15 precisely what you hope he's going to testify to.

16 Now, if the government hadn't given you his witness  
17 statement now, if there is one, how would that failure be a  
18 Brady violation if Augustine shows up and testifies to just  
19 what you want him to say?

20 MR. SCHACHTER: I think that the government's failure  
21 to disclose -- the government still has the obligation to  
22 disclose exculpatory information whether I am able to call  
23 Mr. Augustine or not.

24 Now, if Mr. Augustine -- the charges against him have  
25 been dismissed and I doubt very much that he is going to be

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1 willing to speak to me, and I doubt very much that he will be  
2 willing to take the witness stand.

3 THE COURT: He's subject to subpoena.

4 MR. SCHACHTER: For sure. However, he will  
5 nonetheless have a Fifth Amendment right.

6 THE COURT: Maybe. Maybe not.

7 MR. SCHACHTER: I believe -- and I don't believe that  
8 the government has any intention of calling him as a witness.  
9 And so I believe that the government intends to suppress the  
10 words that Mr. Augustine told the government which were  
11 inconsistent with the indictment's allegations and that would  
12 be a Brady violation. And there's nothing -- there's very  
13 little I can do about that.

14 THE COURT: I'm sorry. I just told you the substance.  
15 Right.

16 Now suppose you have the witness statement. How are  
17 you going to get it into evidence if he won't testify?

18 MR. SCHACHTER: Well, armed with the witness  
19 statement, your Honor, I may come before the Court and ask  
20 for -- to the extent that the government does refuse to  
21 immunize him, I may have a basis to ask for the Court to order  
22 him to testify under a grant of immunity.

23 It is -- whether or not I wish to do that, that -- I  
24 am entitled to more information that will instruct me on those  
25 strategic decisions. I'm entitled to exculpatory information.

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1 THE COURT: I know why you want it. But as I -- when  
2 I was the father of a young child I often tried to explain "I  
3 want" is different from "I get."

4 MR. SCHACHTER: I believe I understand the Court's  
5 views on this.

6 THE COURT: There are respects in which I haven't made  
7 up my mind about what to do about this. You've got at least  
8 two very big problems. You've got the pretrial determination  
9 problem and you've got the dramatic overbreadth of all of this.  
10 So I'm just sharing my thoughts with you because you should be  
11 able to answer them if you have something else you want to say  
12 to those points.

13 MR. SCHACHTER: Your Honor, I'm happy to narrow the  
14 scope of them. I attempted to do that in our papers. If it  
15 would be of assistance to the Court I can try to -- in fact, I  
16 would welcome the opportunity to narrow the requests that we  
17 are seeking with respect to our request for the 302s.

18 THE COURT: You don't want me to regard your failure  
19 to have done it in the first instance as a procedural default  
20 that forecloses that avenue for you, right?

21 MR. SCHACHTER: Absolutely not, your Honor.

22 THE COURT: Look, if you want to try again and make it  
23 narrower, you have the same two weeks I gave the government to  
24 try to deal with the problem they perhaps have. Fair is fair.  
25 So see what you can do.

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1 MR. SCHACHTER: Yes, your Honor. We will do that.

2 THE COURT: OK. Anything else on this motion?

3 MR. SCHACHTER: No, your Honor.

4 THE COURT: OK. Let me just see if I have any other  
5 question on it before we leave it.

6 (Pause)

7 No. Thank you very much.

8 OK. So we now have the other motion. Now that one  
9 never got filed or is it filed under seal?

10 MR. SCHACHTER: It's filed under seal, your Honor.

11 THE COURT: Do you know the docket number offhand?  
12 Don't bother. You know, if you know what docket item number it  
13 is, just call my law clerk tomorrow and tell Ms. Shapiro what  
14 it is because, otherwise, I have start opening all the sealed  
15 envelopes from the vault to figure out what it is.

16 OK. Let's go briefly on that one because the hour  
17 draws late.

18 MR. SCHACHTER: Yes, your Honor.

19 Your Honor, the government disclosed to us that the  
20 undercover agents and the case agents in this case are under  
21 criminal investigation for misusing government funds to be used  
22 for gambling and certain food and beverages during a very  
23 significant undercover operation which forms much of the  
24 allegations of the indictment.

25 We asked the government for additional information

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1 regarding the circumstances of that misappropriation, including  
2 how much money we're talking about, how precisely the federal  
3 funds were used, and more information about their roles in the  
4 investigation. The government declined to provide us with that  
5 information, rather standing on their initial disclosure.

6 The Supreme Court has said that we are entitled to  
7 challenge the thoroughness and the adequacy of the  
8 investigation. We are entitled to evidence that attacks the  
9 reliability of the investigation is what Kyles v. Whitley said.  
10 As the Supreme Court said, indications of conscientious police  
11 work will enhance probative value and slovenly work will  
12 diminish it.

13 There are, as we laid out, issues relating to the  
14 reliability of the Las Vegas operation. There are many odd  
15 things about that -- about the evidence that has been turned  
16 over in connection with what happened in Las Vegas. For  
17 example, we have in the line sheets numerous instances where  
18 there appears to have been a 45-minute long call and, yet, what  
19 is provided to us is that there is no audio content for that  
20 recording.

21 We have a monitored conversation where the case agent  
22 abruptly ended the recording without identifying himself by  
23 name, the time, and there is no indication as to why the  
24 recording device was turned off at that particular time. Was  
25 it intentional? Was it to hide something? These facts we do

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1 not know. We merely know that normal protocol associated with  
2 many of the other recordings was not followed in this instance  
3 by this case agent that is now under investigation.

4 We anticipate -- the government has said that they  
5 have no intention of calling as a witness the case agent or the  
6 undercover agent. However, we anticipate that they do intend  
7 to call the confidential witness, Marty Blazer. Mr. Blazer was  
8 present at the Las Vegas operation. He may have been involved  
9 in the misappropriation. The food and beverages that were used  
10 may have used to become inebriated, Mr. Blazer may have been  
11 during the course of operation, and that may speak volumes to  
12 his relationship with the undercover and the case agent.

13 We should be able to argue that these tapes don't --  
14 the tapes that have been provided to us do not tell the whole  
15 story.

16 There are more questions. There is an allegation that  
17 Mr. Augustine was provided with \$12,700 ostensibly for the  
18 purpose of providing it to the family of another athlete. We  
19 know that with respect to Mr. Little, Mr. Augustine had no  
20 intention of taking any money and handing it to Mr. Little.  
21 What happened with the \$12,700 that Mr. Augustine received?  
22 Was that shared with the case agent? Was that shared with the  
23 undercover agent?

24 There are many issues that address the thoroughness  
25 and the reliability of this investigation. And, as a result,

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1 we are entitled to more information, the information that we  
2 have requested, regarding these criminal investigations of the  
3 case agent and the undercover. And the Second Circuit has  
4 said, United States v. Jackson, that the government cannot  
5 avoid disclosure of this kind of evidence which goes to  
6 material impeachment of a government witness simply by saying  
7 that they're not going to call those witnesses.

8 In Jackson, the circumstances were, the Second Circuit  
9 ruled, that the defense was entitled to impeachment evidence of  
10 a confidential authority who had died prior to trial and  
11 nonetheless the Second Circuit said that -- and even though  
12 there was a video tape of the drug deal that was at issue in  
13 that case, nonetheless the Second Circuit said that they were  
14 entitled to information which may have been useful to impeach  
15 the credibility of that confidential informant, including  
16 evidence that the DEA may have terminated their relationship  
17 with him in the past, which the defense suggested may indicate  
18 some kind of misconduct by this confidential informant.

19 The fact that they're not calling these witnesses,  
20 which we understand why they would not, does not obviate their  
21 disclosure obligation. So we believe that we are entitled to  
22 this information both under Brady and also under Rule 16, as  
23 your Honor described the scope of Rule 16 in United States v.  
24 Stein. That is our argument.

25 THE COURT: OK. Thank you. I'll hear from the

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1 government.

2 MR. MARK: Just very briefly, your Honor. The  
3 government obviously takes any allegations of agent misconduct  
4 very seriously. There was a single incident of alleged  
5 misconduct. The defendants know about this incident because it  
6 was disclosed by the government. It was disclosed also to the  
7 Court when the complaints were sworn out here. There is  
8 nothing that is being hidden from the defense. There is no  
9 other alleged misconduct that the government is aware of here.

10 And this is obviously continuing. There's an ongoing  
11 investigation. If there's other information known, we will  
12 disclose that. And we have not made any decision about whether  
13 to call the case agent or the undercover in this case. And  
14 that's not an appropriate representation of the government's  
15 position here.

16 Unless the Court has any questions particularly we're  
17 prepared to rest on our brief.

18 THE COURT: I don't.

19 I'll take all of the motions under advisement. You'll  
20 hear from me over time. And I thank you all.

21 (Adjourned)  
22  
23  
24  
25